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Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers

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Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers

The impending convergence of several demographic, economic, and social trends in the United States . . . is beginning to raise public concern over the need for future long-term-care healthcare policy direction. The demographic trends (the graying of America) are well understood. Changing family structure, a more mobile American society, and other economic and social trends portend a need to recognize the role of [the] informal care giver as both a desirable and critical component within the long-term-care network. Decreased births and increased longevity, a steady increase in the divorce rate, and the entry of increasing numbers of females into the labor force may all affect the future size and capacity of the informal care network in the United States.[1]

I. INTRODUCTION

One night, when I was an arrogant teenager, I sat at the table with my family eating dinner. As usual, I was complaining about the meal, as well as stupid family rules like having a curfew. At the end of my tirade, my father, unfazed, said that he could not wait until he and my mother were older and living with me. Then, they too would complain and express their undying ingratitude, much as I had done. Being the ever doting daughter, I professed, "I'll just put you in a home." Little did I know that providing care for the elderly would become a major challenge faced by society in my adult years.

The aptly dubbed "graying of America"[2] raises several concerns regarding long-term healthcare for the elderly. We would all like to remain healthy, active members of society, but the sad reality is that many elderly Americans require long-term healthcare. Although the desire to remain at home is strong among older Americans, few have the financial resources available to finance long-term professional in-home healthcare. As a solution, families will oftentimes attempt to provide the services themselves, rather than utilizing professional care.[3] Thus, as will be demonstrated herein, a vast number of elderly

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1. Thomas Jazwiecki, *Long-Term Care for the Elderly in the United States, in* Caring for an Aging World, 288, 328 (Teresa Schwab ed., 1989).

2. Jazwiecki, *supra* note 1.

3. The focus of this comment is on in-home healthcare provided by family members; therefore, professional healthcare is beyond the scope of this comment.

Americans rely on family caregivers.[4] Unfortunately, this option raises significant financial concerns for those family caregivers. This comment will present evidence that family caregivers often receive either less than adequate compensation, or no compensation at all for the support they provide.

A majority of states do not have legislation allowing family caregivers to make claims against the estates of the care recipients.[5] Furthermore, the cases demonstrate that a jurisprudential rule has developed severely restricting the ability of family caregivers to recover any compensation whatsoever. Therefore, state legislation is necessary in order to protect the interests of these providers of care for the elderly.

Though compensation may take many forms, this comment focuses only on monetary compensation via claims against the estates of elderly care recipients.[6] Part II of this paper illustrates that compensation of family caregivers is a problem that must be resolved. Part III offers a brief discussion of public versus private incentives for family members to provide care to their elders. Although public incentives are valuable and necessary, they do not go far enough. Next, Part IV explores a phenomenon referred to as the doctrine of non-recovery, including a look at both the common law and Louisiana civil law approaches to compensation of family caregivers. Part V examines a unique solution to the problem adopted by the state of Illinois: a statute providing family caregivers with an express right to file a claim against the estate of the deceased. Finally, Part VI offers a solution that provides an incentive to family members to continue providing long-term home healthcare by rewarding family caregivers for their sacrifices.

II. THE NEED FOR COMPENSATION FOR FAMILY CAREGIVERS

From 1987 to 1997, the number of Americans age 65 and older grew from 28 million to 34 million, an increase of 21%.[7] The vast

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4. Throughout this comment the term "family caregiver" will be used to refer to a family member, whether related by blood, marriage or adoption, who assists in caring for an elderly relative. The form of care includes assistance in any number of activities such as cooking, cleaning, bathing, and other daily chores.

5. As of the date of this writing, one state has legislation expressly allowing family members to make such a claim. *See* 755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992).

6. Although there is a possibility that family caregivers could be entitled to compensation by virtue of being a preferred heir (for instance, someone who takes a share of the estate before distributions to all other heirs), there is a concern that the estate will be depleted by claims of creditors before a preferred heir is entitled to his or her share. Therefore, this comment focuses on claims against the estate where the family caregiver is treated as a creditor.

7. Donna L. Wagner, *Comparative Analysis of Caregiver Data for Caregivers to the Elderly 1987 and 1997*, 1 (June, 1997) *available at*

majority of older Americans prefer to live their remaining days at home, or at least outside of a nursing home.[8] This desire, however, poses many problems for a large number of our nation's elderly population. The financial capability to obtain home healthcare is among these concerns. The cost of providing home healthcare for the elderly has been estimated at approximately $100 per day or about $36,500 per year.[9] For many, this is simply not feasible.[10]

A common solution to this dilemma comes from within the elder's family. It has been found that more than 80% of all the care provided to older people is "informal," meaning it is provided by family members or other unpaid volunteer caregivers in the home rather than by professionals.[11] As a result of the many family members taking on the additional title of family caregiver, the "Sandwich Generation"[12] has emerged. Members of the Sandwich Generation are people who have been "sandwiched" between the responsibilities of caring for their own children still living at home and the responsibility of caring for their aging parents.[13] This situation raises many concerns for the caregiver, including lost employment opportunities, financial strain, and emotional stress.[14]

It has been estimated that between 1987 and 1997 the number of caregiving households in America grew from 7 million to more than 21 million, a staggering increase of 278%.[15] It has also been predicted that the number of American households providing care to the elderly will grow to more than 39 million by the year 2007.[16]

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http://www.caregiving.org/nacanalysis.pdf (last visited April 14, 2003).

8. A survey done by the American Association of Retired Persons reports that 85% of the respondents prefer to remain in their own homes if the need for care arises. John Migliaccio, Neal E. Cutler, *Caring Today, Planning for Tomorrow*, 14 (1999) *available at* http://www.caregiving.org/nacguide.pdf (last visited April 14, 2003).

9. Peter J. Losavio, Jr., *Long-Term Care Planning for the Elderly*, 2 (November 2002) (unpublished material on file with Louisiana Law Review, Louisiana State University). By comparison the cost of nursing home care has been estimated to be $40,000 per year.

10. In fact, it has been estimated that 95 percent of people age 65 and over will not be covered should the need for long-term care arise. Losavio, *supra* note 9, at 1.

11. Migliaccio, *supra* note 8, at 3.

12. *See, e.g.*, Alison Barnes, *The Policy and Politics of Community-Based Long-Term Care*, 19 Nova L. Rev. 487, 500 (Winter 1995).

13. *Id.*

14. *See, c.f. The MetLife Juggling Act Study, Balancing Caregiving with Work and the Costs Involved* (November 1999) *available at* http://www.caregiving.org/JugglingStudy.pdf (last visited April 15, 2003); and Marla Berg-Weger, Caring for Elderly Parents, The Relationship Between Stress and Choice (Stuart Bruchey ed., 1996).

15. Wagner, *supra* note 7, at 1.

16. *Id.*

Although this indicates that Americans are increasingly accepting the task of caring for their elderly relatives, there is still a need to provide further incentives for future generations to continue to provide the much needed care. Furthermore, the nation as a whole should recognize the significant role family caregivers play and the sacrifices they have made, by allowing caregivers to make claims against the estates of the care recipients.

By considering its effect on the family caregiver, one may better understand the impact of the increase in family caregiving. One area of concern is the employment status of the caregiver. It has been estimated that over the next 10 years, the total number of employed caregivers in the United States will increase to between 11 and 15.6 million working Americans, which is approximately 1 in 10 employed workers.[17] The employment status of the caregiver can have a drastic effect on the entire family unit. A working caregiver can "incur significant losses in career development, salary and retirement income, and substantial out-of-pocket expenses as a result of their caregiving obligations."[18] The average loss of wealth experienced by caregivers is estimated to be "substantial, averaging **$659,139** over the lifetime."[19] In 1997 it was found that the stress of caring for an aging friend or relative resulted in one-tenth of the caregivers giving up work permanently.[20] In addition, 11 percent reported having taken a leave of absence, and approximately 7.3 percent reduced their hours from full-time to part-time or took a less demanding job.[21] Likewise, the period of time devoted to caring for a family member is not always temporary, and often lasts several years.[22]

Not only do family caregivers suffer economic losses in connection with their employment, a significant number of caregivers spend their own money to provide assistance to their elderly

17. *The MetLife Juggling Act Study, Balancing Caregiving with Work and the Costs Involved* 2 (Nov. 1999) *available at* http://www.caregiving.org/JugglingStudy.pdf (last visited April 15, 2003).

18. *Id.* at 3.

19. *Id.* at 6 (emphasis in original).

20. This study indicates 3.6 percent took early retirement and 6.4 percent gave up work entirely. *The MetLife Study of Employer Costs for Working Caregivers* 1 (June, 1997) *available at* http://www.caregiving.org/metlife.pdf (last visited April 15, 2003).

21. *Id.* at 1.

22. In fact the average duration for providing care is 4.5 years. Further, 64 percent of caregivers have provided care to their primary care recipient for less than 5 years, 21 percent have done so for 5 to 9 years, and 10 percent have provided care for 10 years or more. *Family Caregiving in the U.S., Findings from a National Survey* 12 (June 1997) *available at* http://www.caregiving.org/finalreport.pdf (last visited April 15, 2003).

relatives.[23] Caregivers do not always keep track of how much of their own money they spend on caregiving during a typical month. However, those that do keep track estimate that they spend approximately $171 per month, which totals $1.5 billion per month spent out-of-pocket on caregiving nationwide.[24]

Although the cost of providing care is significant to the caregiver, there is a great benefit bestowed on the whole of society. A 1999 study estimates that the economic value of the services provided by family caregivers would be close to $200 billion per year if the services were performed by professionals.[25] Arguably, the government would face a tremendous financial burden if family caregivers stopped providing care and the government was faced with no other option than to publically fund this type of long-term healthcare.

Finally, in 1992, surveys indicated that family support enabled approximately 95 percent of elders to remain in the community rather than in nursing homes.[26] However, concerns exist with regard to the ability and willingness of families to continue to provide this support in conjunction with increasing needs.[27] Most "family" care is provided by only one family member, rather than the entire family.[28] It has been reported that "societal norms . . . have created a philosophical trend which shifts the perceived responsibility of family care from the family to the individual, thus suggesting that caregiving of family members is a voluntary venture."[29] Each state should encourage family members to continue volunteering and providing much needed and valuable support to their aging relatives, by providing certain incentives to family caregivers. One such incentive is compensation for the family caregiver via claims against the care recipient's estate. This solution would also serve to reward family members for voluntarily taking on this demanding job.[30]

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23. *Id.*
24. *Id.* at 24.
25. *The MetLife Study of Employed Caregivers: Does Long Term Care Insurance Make a Difference?* 1 (March 2001) *available at* http://www.caregiving.org/LTC%20study%20final.pdf (last visited April 15, 2003).
26. Berg-Weger, *supra* note 14, at 10.
27. *Id.*
28. *Id.*
29. *Id.*
30. There is a concern regarding persons who take advantage of the elderly in their old age by unduly influencing the elder to turn over assets to a purported caregiver. These abusive caregivers are not the topic of this paper. This paper focuses on family members who provide adequate and valuable nursing and other services to an elderly relative. The topic of undue influence, although it is a valid concern, is outside the scope of this comment.

III. A BRIEF LOOK AT PUBLIC VS. PRIVATE COMPENSATION

A. Examples of Public Funding of Family Caregiver Compensation[31]

When considering public funding for long-term healthcare, many Americans immediately think of Medicare or Medicaid. Many older Americans in need of long-term healthcare may be faced with a financial crisis because of a misunderstanding of these programs. A common misconception among older Americans is that financing of long-term healthcare is provided by Medicare and Medicaid.[32] This assumption is incorrect. Programs such as Medicare "provide very little financial assistance for long-term healthcare, especially in the home."[33] In fact, "Medicare does not pay for the typical long-term care support services most people need."[34]

With reference to Medicaid, there are strict financial guidelines, and even if these guidelines are met, Medicaid provides only minimal support for nursing home costs and nothing for home healthcare.[35] If people who have depleted their financial resources require long-term nursing home care, Medicaid may pay these bills.[36] To meet the financial requirements for Medicaid, the person must show that she has what Medicaid deems insufficient financial resources, usually less than $2,000.[37] These misconceptions are "part of the reason why family caregivers step in when needed, often providing multiple care services for a much longer period than they anticipated."[38]

One emerging public incentive for the family caregiver is a tax incentive at the state level, in the form of tax exemptions, tax credits, and tax deductions.[39] Policymakers enacted the various tax incentives believing that many Americans choose not to assist family members even though they possess the means to do so.[40] Policymakers hoped to increase the number of family caregivers and avoid the need to

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31. Although public funding is important, an expansive discussion of it is outside the scope of this comment. However, its existence bears on the theme of this comment and is, therefore, relevant for at least a minor discussion. For a more expansive discussion *see* Nathan L. Linsk, et al., Wages for Caring: Compensating Family Care of the Elderly (1992).

32. Losavio, *supra* note 9, at 1.

33. Migliaccio, *supra* note 8, at 3.

34. *Id.* at 5.

35. Nathan L. Linsk,et al., *Compensation of Family Care for the Elderly, in* Family Caregiving in an Aging Society 64, 74 (Rosalie A. Kane & Joan D. Penrod eds. 1995).

36. Migliaccio, *supra* note 8, at 5.

37. *Id.*

38. *Id.* at 3.

39. Linsk, *supra* note 35, at 64-65.

40. *Id.* at 65.

expand government programs.[41] One criticism of this option is that it does not bestow the benefit on the most needy.[42] The tax incentives most often benefit higher income families rather than lower income families.[43] Higher income families can more readily afford to hire long-term healthcare from outside the family, thereby decreasing the need for the family caregiver. Moreover, the tax plans are complex and expensive to administer, and it is difficult for policymakers to place an exact dollar figure on volunteered services.[44] Additionally, many of the programs require the family members to live in the same household in order to take advantage of the tax incentives.[45] This option is sometimes undesirable for families, and can lead to the most stressful caregiving situations.[46] Finally, tax plans often assume that all household members are employed, thereby excluding families of retirees from the programs.[47]

A second public incentive is direct compensation to family caregivers through wages or cash grants from the state government, which can take many forms such as direct cash or voucher payments to families.[48] An unrestricted cash grant allows consumers to use the funds for any purpose, which may or may not include the purchase of home healthcare services.[49] Methods for paying relatives have ranged from hiring family members to work as employees of existing community service programs, to giving allowances to elderly clients so that they may directly purchase their own services.[50] Each arrangement differs in the amount of control given to homecare agencies, clients, and families.[51] On the other hand, a restricted voucher is used only for a specific type of service.[52] Unfortunately, grants have usually been in the form of restricted cash grants or vouchers.[53]

Although cash grants and vouchers offer a promising incentive, strict limitations are often attached.[54] One such limitation exists with Medicaid wherein the regulations "prohibit the payment of relatives

41. *Id.*
42. Linsk, *supra* note 31, at 13.
43. Linsk, *supra* note 35, at 65.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Linsk, *supra* note 35, at 15.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. Linsk, *supra* note 35, at 74.

through the definition of Personal Care Services."[55] In addition to federal prohibitions on direct compensation to family members, many states offer their own prohibitions.[56] Even where there is a possibility of direct compensation, the payments to relatives are typically restricted to very specific circumstances where the care recipient is at a high risk of requiring institutionalization.[57] Also, in some jurisdictions, payments are restricted by a program's locus in one particular agency and the program's reliance on certain funding sources.[58] Restrictions on funding range from total consumer discretion in hiring the caregiver to complete state agency management of home healthcare.[59] Other examples of restrictions include living arrangements of the caregiver and care recipient,[60] qualities of the caregiver,[61] whether the caregiver meets welfare guidelines,[62] whether the caregiver is employed,[63] and whether the caregiver is licensed or screened.[64] A combination of all of these restrictions makes public funding for direct compensation seem like only a hope rather than a viable solution.[65] Therefore, a need arises for private funding of home healthcare.

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55. *Id.* Medicaid regulations provide that "personal care services" are:

> services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease that are-
> (1) Authorized for the individual by a physician in accordance with a plan of treatment or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State;
> (2) Provided by an individual who is qualified to provide such services and *who is not a member of the individual's family*; and
> (3) Furnished in a home, and at the State's option, in another location.

42 C.F.R. § 440.167(a) (2001) (emphasis added).

56. Linsk, *supra* note 35 at 74.

57. *Id.* at 75.

58. *Id.*

59. *Id.*

60. *Id.* at 78. Specifically, whether the caregiver and the care recipient are members of the same household.

61. *Id.* One example given indicated that a family caregiver would only be compensated if another caregiver, who spoke the same language as the care recipient, could not be found.

62. *Id.* at 79.

63. *Id.*

64. *Id.*

65. For a more expansive discussion on public funding for family caregiving *see* Linsk, *supra* note 31. Arguably, public funding will be crucial for low income families facing poverty, and therefore, should be expanded. However, the focus of this comment is on private funding for family care, particularly in middle class families. The use of an individual's assets to provide incentives to family members will avoid a drain on the national economy that public funding of all caregiving arguably will entail. *See* Part II above regarding the costs of caregiving.

B. Private Funding

In addition to the public funding for long-term home healthcare for the elderly, private funding options are emerging. Two such options are long-term healthcare insurance and the reverse mortgage. Although both of these options are promising solutions, each has its drawbacks.

Long-term healthcare insurance is costly.[66] Even if long-term healthcare insurance is feasible for elderly people or their families, the role of the family caregiver does not disappear. Studies show that insurance-financed benefits do not replace significant amounts of family caregiving.[67] On average, working caregivers spend only slightly fewer hours per week with the care recipient than caregivers caring for the uninsured.[68] This suggests that for the most part, insurance-financed care is not an adequate substitute for family caregiving.[69]

Another solution to providing long-term home healthcare is the reverse mortgage. A reverse mortgage differs from a traditional mortgage in that the lending institution calculates the value of a persons' home and then pays the home owner in either monthly installments or a lump sum for the home's value.[70] The loan is not repaid as long as the homeowner lives in the home.[71] However, the loan must be repaid when the homeowner permanently moves, sells the house, dies, or reaches the end of the pre-selected loan term.[72] Home equity is the largest asset of older people in the United States today.[73] The advantage of the reverse mortgage is that it puts cash directly in the hands of the elderly. These funds might be used to pay for medical and home care bills.[74] Though the reverse mortgage may provide substantial financial aid, it also suffers from several drawbacks.

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66. Barnes, *supra* note 12, at 524.

67. *The MetLife Study of Employed Caregivers: Does Long Term Care Insurance Make a Difference?*, *supra* note 25, at 3.

68. *Id.* The caregiver of a person with insurance spent on average 24 hours per week rather than 27 hours per week with the care recipient. *Id.*

69. *Id.*

70. *See c.f.*, *Understanding Reverse Mortgages*, *available at* http://www.aarp.org/revmort (last visited April 15, 2003); *"Fast Facts" from the Federal Trade Commission, Reverse Mortgages,* (October 1993), *available at* http://www.hsh.com/pamphlets/rms.html (last visited April 15, 2003).

71. *Id.*

72. *"Fast Facts" from the Federal Trade Commission, Reverse Mortgages,* (October 1993), *available at* http://www.hsh.com/pamphlets/rms.html (last visited April 15, 2003).

73. Migliaccio, *supra* note 8, at 21-22.

74. *Id.* at 22.

With the reverse mortgage, a third party lender enters the picture. Although the loan does not have to be repaid immediately, the lender gains a security interest in the home which can be asserted against the heirs after the death of the homeowner.[75] The family has the option to pay off the mortgage and keep the home but, if they cannot, it is possible the home will be sold to a third party to satisfy the debt, thereby taking the home away from the family. A better option would be to allow care recipients to keep their home, unencumbered by a mortgage, and to use this valuable asset as encouragement for family members to provide care by promising compensation from the estate.

Assuming it is more cost effective for family members to provide nursing care by rendering services at a lower cost than professionals would charge, avoiding the use of a reverse mortgage would preserve more of the estate for the family. Likewise, allowing the family members to render care with the promise of later compensation is more likely to reduce the chances of a third party taking possession of the family home and selling it to pay off the mortgage. It is better to avoid such a risk and encourage family members to render the necessary care, while leaving open the possibility of later compensation from the estate. This would allow the heirs to protect their inheritance while still providing much needed and valuable care for their aging relatives.

C. A Combination of Private and Public Incentives

Regardless of the effectiveness of each of the previously discussed public funding solutions, they do not exist in all states and are therefore of limited consequence to the nation as a whole. Additionally, public funding as an exclusive solution could substantially drain the states' economies. Moreover, the exclusive reliance on public funding overlooks the more immediate and obtainable compensation alternative: private funding of family caregiving via claims against the estate of the care recipient.

Ultimately, a combination of both public and private incentives is the most desirable solution for providing compensation to family caregivers. This is primarily because a combination of public and private compensation will provide compensation for low income families as well as higher income families. Some elders have assets to distribute upon death, and therefore claims against an estate are a feasible source of compensation in these situations. However, others will die in poverty, leaving their family caregivers with nothing in the way of compensation. In this regard, public funding is the only source of compensation for the caregiver.

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75. *See, c.f. Understanding Reverse Mortgages*, *available at* http:// www.aarp.org/revmort/ (last visited April 15, 2003).

IV. THE DOCTRINE OF NON-RECOVERY

A. The Origins of the Doctrine of Non-Recovery

What this comment refers to as the doctrine of non-recovery might also be labeled "the family member rule."[76] The doctrine of non-recovery is a jurisprudential rule in contract theory, whereby courts presume that services provided by family members have been rendered gratuitously if there is no express contract.[77] Accordingly, there is no consideration for the alleged contract and therefore it is unenforceable without express proof.[78]

In addition, when dealing with implied contracts, there is a general presumption in American jurisprudence that when a person renders services to another under circumstances which suggest an expectation of payment, a contract will be implied and the person rendering the services is entitled to recover the value of those services.[79] However, a person that renders services to a blood relative is faced with a much different presumption. Where the parties are related, especially if the relationship is that of parent and child, the presumption is reversed. In this situation, it is presumed that the services were rendered in consideration of love and affection and without expectation of payment.[80] The claimant must demonstrate by "clear, convincing and satisfactory evidence,"[81] that an express or implied agreement existed providing for compensation for the services.[82] This burden of proof is very strong, making it nearly impossible for a family member to recoup the value of his services from the estate of the decedent.

The doctrine of non-recovery originated in the middle of the nineteenth century.[83] The doctrine was originally justified on two grounds. The first was that services rendered in a household where a reciprocity of benefits existed were intended to be gratuitous. Under this justification, courts noted that households functioned as a

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76. Jonathan S. Henes, *Compensating Caregiving Relatives: Abandoning the Family Member Rule in Contracts*, 17 Cardozo L. Rev. 705 (1996).

77. *Id.*

78. *Id.*

79. Clifton B. Kruse, Jr., *Contracts to Devise or Gift Property in Exchange for Lifetime Home Care - Latent and Insidious Abuse of Older Persons*, 12 Prob. L.J. 1 (1994).

80. Matter of Estate of Wilson, 178 A.D.2d 996, 997 (N.Y. App. Div. 1991) (citing In re Adams Estate, 1 A.D.2d 259 (N.Y. App. Div. 1956); In re Schultz' Estate, 18 Misc.2d 1012 (N.Y. Sur. Ct. 1959); In re Basten's Estate, 204 Misc 937 (N.Y. Sur. Ct. 1953). *See also* Kruse, *supra* note 79.

81. Matter of Estate of Wilson, 178 A.D.2d 996, 997 (N.Y. App. Div. 1991).

82. *Id.*

83. *See* Henes, *supra* note 76, at 706-07.

system of mutual convenience, whereby family members contributed to the entire household without an expectation of payment.[84] Accordingly, services were not rendered in expectation of payment, but rather in expectation of corresponding benefits of services rendered by other family members.[85]

The second justification was that public policy required a rule that would safeguard the inner-workings of the household.[86] Under this reasoning, courts justified the doctrine as protecting the "sanctity" of the household by discouraging family members from turning to litigation to settle their disputes; litigation would disrupt the entire household.[87] Although both justifications had their place in the nineteenth century household, modern courts refuse to recognize that this model is no longer appropriate, and they continue to apply this archaic rule.

The family of the nineteenth century often consisted of many generations living in the same household throughout their lives.[88] In these households, all family members shared responsibility for the chores necessary for the daily running of the home.[89] However, the United States, which started as a rural, agricultural based society, is now an urban, industrial nation.[90] As a result, the extended family living in the same household has become obsolete for many of today's American families.[91] Families have begun to rely on outside sources to provide the benefits that were once received from large extended families. Also, the number of services performed by members within the household has dramatically decreased.[92] Despite the dynamics of the American family having changed in modern times, courts continue to apply the presumption of gratuity when faced with a claim for compensation for services rendered between family members, in effect creating a doctrine of non-recovery. Therefore, state legislation is required to overcome this deeply imbedded jurisprudential rule which bars family members from obtaining compensation for family caregiving.

B. Common Law

In common law jurisdictions, when a person performs services in favor of an unrelated individual, and the recipient is aware of and accepts the benefit, the law will imply a promise on the part of the recipient to

84. *Id.* at 709.
85. *Id.*
86. *Id.* at 708.
87. *Id.* at 710.
88. Henes, *supra* note 76, at 714.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*

repay the caregiver.[93] However, a different rule applies when the person rendering services and the person receiving services are related. In such a situation, the law implies that the services were rendered gratuitously; the recipient is under no obligation to pay for the services rendered.[94]

Due to varying fact patterns among the cases, no definitive rule on the doctrine of non-recovery has emerged. However, some basic principles are constant throughout the jurisprudence. In ruling on claims for compensation for family caregiving services, the courts tend to look for a "family-like" relationship as well as a "mutuality of benefits."[95]

1. The "Family-like" Relationship

Courts have found that if a close kinship relationship exists between the decedent and the caregiver, a presumption exists that the services were rendered gratuitously.[96] For claims asserted by the caregiver to be sustained, this presumption must be overcome. It has been stated that "[t]he maxim is this: a person cannot provide an unsolicited kindness to kin and thereafter make the kindness a matter of claim against the donee."[97] In fact, the courts have gone beyond actual kinship and looked to a "family-like" relationship. It is the intimacy of this actual, family-like relationship that creates the burden of proving either by implied contract or in equity that payment is legally justified.[98]

In *Estate of Dodson*,[99] the court extended the "family-like" relationship to co-habitants. It outlined several factors used to determine what constitutes a family: (1) there must be a social status, (2) there must be a head who has a right, at least in a limited way, to direct and control those gathered into the household, (3) the head must be obligated either legally or morally to support the other members, and (4) there must be a corresponding state of at least partial dependence of the other members for this support.[100] *Dodson* involved a co-habitating couple; therefore, no kinship existed. The claimant sought recovery for services rendered in connection with the decedent's cattle business and for cooking, cleaning, and entertaining

93. Clifton B. Kruse, Jr., *The Effect of Relational Intimacy on Estate Claims*, 21 Colo. Law. 699 (1992).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. Kruse, Jr., *supra* note 93.
99. Estate of Dodson, 878 S.W.2d 513 (Mo. Ct. App. 1994).
100. *Id.* at 515.

business clients.[101] She testified that she had never held herself out to be the decedent's wife, although they had lived together for some time.[102] Nonetheless, the court found a "family-like" relationship by analyzing the four factors outlined above.[103] The woman was not allowed to recover for the value of the services rendered.[104] Moreover, the court did not address the fact that no actual kinship relationship existed. The woman was not an heir and could not recover from the estate unless there was a provision in the deceased's will which provided for her. By labeling her as "family," it also barred the use of the general presumption of implied contracts whereby a person accepting a benefit is presumed to intend payment for services rendered. As a result she received nothing in the form of compensation.

2. The Mutuality of Benefits

Another factor that courts rely on in finding the presumption of gratuity is a mutuality of benefit and burden. The presumption assumes mutuality of benefit and burden within the family unit.[105] For example, a family member might benefit by sharing expenses by living together and splitting costs, but he or she will also have the burden of performing daily chores, such as cooking and cleaning for the mutual benefit of the other members of the household. In other words, the presumption is based on a theory that every member of a household will suffer a burden while simultaneously benefitting from the labor of other family members. However, the rule is not relevant in cases where there is neither a close association nor a community of interest in the family.[106] Where family members have been living separate and apart for an extended period of time, the presumption's essential inference is missing; the parties no longer enjoy a "mutuality of benefits." Thus, a court upheld a daughter's claim against her father's estate for services rendered when there had been a fifty-year separation prior to the rendering of care.[107] On the other hand, under the "mutuality of benefits" policy, a child who has always lived with his or her parents will have a harder time proving that the services were not

101. *Id.* at 516. This case is not presented for the discussion on the type of services rendered, rather for its focus on the "family-like" relationship as a bar to the recovery of compensation for *any* services rendered.
102. *Id.* at 516-517.
103. Estate of Dodson, 878 S.W.2d 513, 518 (Mo. Ct. App. 1994).
104. *Id.*
105. Kruse, *supra* note 93.
106. *Id.*
107. *Id.*

rendered gratuitously than a child who has lived separately from the parent and returned home to render care.

In *Drisbrow v. Durand,*[108] the sister of the decedent had rendered housekeeping services for many years prior to her brother's death. The court held that the presumption of gratuity applies to brothers and sisters, as well as to children and parents, because of the mutual benefits experienced by each member of the household.[109] The New Jersey Court of Appeals reasoned that family members who live in the same household participate in mutual acts of kindness for the convenience of all household members, and these acts are performed gratuitously; however, where the members are not of the same household the implication does not arise, because the underlying presumption is missing.[110]

3. Problems with the Common Law Scheme

One might first look to contract theory in determining whether a family member will be compensated for providing services to an elder relative in need. Generally, a contract to will property in exchange for services is valid and enforceable.[111] The Uniform Probate Code provides: "[a] contract to make a will or devise . . . can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract."[112] The Georgia Supreme Court also recognized that contracts to will property have been upheld in America from the earliest times and the validity of these contracts seems to be beyond all doubt.[113] However, this general rule does not hold true in all situations.

Contracts to will property in exchange for services are also valid and enforceable when they concern family members,[114] but there is an additional hurdle to overcome when dealing with such situations.

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108. 24 A. 545 (N.J. 1892).
109. *Id.* at 546.
110. *Id.* The court held that;

> . . . the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered.

111. *See* Kruse, *supra* note 79 at y.
112. Unif. Prob. Cd. § 2-701 (amended 1997).
113. Kruse, *supra* note 79; Mann v. Moseley, 67 S.E.2d 128, 129 (Ga. 1951).
114. Kruse, *supra* note 79 at 5; Unif. Prob. Cd. § 2-701 (amended 1997).

Although contracts between family members are valid and enforceable, express contracts rarely exist in family situations. How often, if ever, do relatives sit down and hammer out express contracts for services, let alone put the agreement in writing to offer proof that it exists? Case law reporters are replete with examples of family members attempting to collect the value of the services rendered, indicating that these written contracts rarely exist.[115] In each case, the family caregivers are attempting to overcome the presumption of gratuity, because no express written contract exists. Contract negotiations on an express written contract of this sort would arguably put family members in an awkward situation and could lead to animosity. Thus, it is not hard to imagine why such contracts are infrequent.

Another problem occurs with respect to the timing of a claim. A caregiver is at a significant disadvantage when asserting a claim after the care recipient dies rather than before. In fact, "[f]ailure to assert a claim until after the decedent beneficiary's death will weigh heavily against the claimant where the claimant is a member of the decedent's family."[116] Apparently, the family caregiver must demand payment *before* the beneficiary's death. But, such a demand is often not reasonable, especially since the care recipient likely does not have the cash available to pay for the care. If they did have such assets, they would be less likely to need a family caregiver. As noted in Part II above, the single largest asset of the elderly are their homes. Therefore, a demand for payment before death may require the care recipient to sell their home. A person who is concerned enough to care for an elderly family member should not be required to put the elderly relative out of his or her house in order to obtain compensation. State legislation which allows for a claim upon the estate after the care recipient dies is a much better option.

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115. *See, c.f.* Smith v. Milligan, 43 Pa. 107 (Pa. 1862); Hall v. Finch, 29 Wis. 278 (Wis. 1871); Marietta v. Marietta, 57 N.W. 708 (Iowa 1894); McWhorter v. Pitman's Adm'r, 245 S.W. 133 (Ky. 1922); Lucius' Adm'r v. Owen, 248 S.W. 495 (Ky. 1923); Nissen v. Flournoy, 254 S.W. 540 (Ark. 1923); In Re Collins' Estate, 83 Pa. Super. 31 (Pa. Super. 1924); Larson v. Larson, 201 N.W. 420 (Minn. 1924); Witte v. Smith, 152 S.W.2d 661 (Mo. Ct. App. 1941); Maasdam v. Massdam's Estate, 24 N.W.2d 316 (Iowa 1946); Osborne v. Boatmen's Nat. Bank of Springfield, 732 S.W.2d 242 (Mo. Ct. App.1987); Kohler v. Armstrong, 758 P.2d 407 (Or. Ct. App. 1988); Estate of Jesmer v. Rohlev, 609 N.E.2d 816 (Ill. App. Ct. 1993); In Re Estate of Rollins, 645 N.E.2d 1026 (Ill. App. Ct. 1995); In Re Estate of Lutz, 620 N.W.2d 589 (N.D. 2000). This is merely a sample of reported cases in which family members did not have written contracts for services or written contracts to will property. It is evident from the above that from the mid 1800's, until as late as 2000, family members simply were not entering written contracts to provide services.

116. Kruse, *supra* note 93.

C. The Civil Law in Louisiana

The doctrine of non-recovery in Louisiana dates back to the 1800's, and it has been stated that until 1949, Louisiana cases were in accord with the common law.[117] However, three major themes are now prevalent in the Louisiana approach, in addition to the general presumption of gratuity in the common law approach. The success of obtaining compensation will turn on: 1) whether the parent is "in need;" 2) whether a child rendering care is an only child; and, 3) whether the caregiver is a collateral relative.

1. Parents "In Need" and Only Children

For purposes of recovering expenses of caregiving by a child to his elderly parent, one factor that Louisiana courts look to is whether the parent is "in need."[118] In 1866, in *Estate of Oliver*,[119] the Louisiana Supreme Court held that a child who renders services to a parent has a right of contribution from his or her siblings.[120] In *Oliver*, a son had "supplied [his mother] with what she needed"[121] for 12 years before her death. The court held that the son was entitled to contribution from his 9 siblings because his mother was "in need" when he provided for her.[122]

On the other hand, more than 20 years later, in *Succession of Guidry*,[123] the Louisiana Supreme Court held that when a child renders services to a parent in need, the child is repaying a debt to the parent and thus is not entitled to a claim against the estate as a creditor. In *Guidry*, a mortgage creditor challenged a daughter-in-law's claim for compensation for board, lodging, nursing and other services which she rendered to her mother-in-law for two years during her last illness. The claimant was also the wife of the executor of the estate. The court found that the claim actually belonged to the son,

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117. R.H.G., Jr., *Successions – Presumption of Gratuity of Services Rendered by Child to Parent – Art. 229, La. Civil Code of 1870*, 23 Tul. L. Rev. 292 (1948).

118. La. Civ. Code art. 229 provides;
> Children are bound to maintain their father and mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants . . . limited to life's basic necessities of food, clothing, shelter, and health care, and [the obligation] arises only upon proof of inability to obtain these necessities by other means or from other sources.

119. 18 La. Ann. 594 (1866).

120. *Id.*

121. *Id.*

122. *Id.*

123. 40 La. Ann. 671, 4 So. 893 (1888).

who was the executor, not his wife, and that he was not entitled to compensation because he was discharging a debt owed to his mother who was in "penurious circumstances."[124]

Several years later the Court returned to the prior holdings granting caregivers compensation if the recipient is in need. In *Succession of Templeman*[125] a daughter nursed her mother who was bedridden and suffering from a broken hip for more than 11 months before she died. The daughter made a claim for nursing and other personal services, as well as a separate claim for feeding the stock. The court held that children who care for an "indigent" parent are entitled to a contribution from coheirs, each for their virile share.[126] The court found that the mother was "amply" able to support herself and therefore the daughter was not entitled to a claim for contribution from the coheirs.[127] Therefore, under *Templeman*, the child is entitled to compensation in the form of contribution from siblings when services are rendered to a parent "in need."

In *Muse v. Muse*,[128] the court was faced with a child who had rendered services to his mother. The services were characterized as manual labor performed on two farms and were performed for approximately 8 years before his mother's death. The court found that the mother was not in need because she owned 15 acres of land in her own right as well as a usufruct over 120 additional acres.[129] Therefore, the son was not entitled to contribution from his 11 siblings, reinforcing the holding in *Templeman* that children of parents who are "in need" are entitled to contribution from siblings, but children of parents who are not "in need" are not entitled to contribution.[130]

In *Latour v. Guillory*,[131] the court looked to *Guidry* and clarified that the obligation of children to support a parent in need is solidary. Therefore, a child who has more money than his siblings is not required to contribute more to the parent; the debt is distributed equally among the children.[132]

The above cases indicate a strong presumption that children who render services to a parent are doing so gratuitously.[133] However,

124. *Guidry*, 40 La. Ann. at 673, 4 So. at 895.
125. 134 La. 798, 64 So. 718 (1914).
126. *Templeman*, 134 La. at 799, 64 So. at 718.
127. *Id.* at 799-800, 64 So. at 718.
128. 215 La. 238, 40 So.2d 21 (1949).
129. *Muse*, 215 La. at 241, 40 So.2d at 22.
130. The court also found the facts of *Templeman* to be parallel, where the child had rendered nursing services, thereby implying that services rendered may be personal or domestic, as well as manual labor. *Muse*, 215 La. at 243, 40 So.2d at 23.
131. 134 La. 332, 340, 64 So. 130, 133 (1914).
132. *Id.*
133. Farrar v. Johnson, 172 La. 30, 133 So. 352 (1931).

when a parent is found to be in necessitous circumstances pursuant to Civil Code article 229, the child rendering services is entitled to a claim for contribution from his or her coheirs.[134] The claim is limited to contribution from coheirs, and the caregiver is not entitled to a claim against the estate.[135] Consequently, an only child of a parent who is "in need" will have no siblings from whom to seek contribution. Arguably, the estate will be distributed to all creditors before the child is entitled to his or her share as an heir. Accordingly, the best method to provide compensation to an only child of a parent "in need" is to make them a creditor of the estate via a claim as a family caregiver. If the child is a creditor, he or she will stand on equal footing with all other creditors rather than being relegated to taking what is left in the estate after all creditors have been paid, which is likely to be nothing if the parent is insolvent.

2. Children vs. Collateral Relatives

In *Succession of Dugas*,[136] the Louisiana Supreme Court held that the presumption of gratuity, particularly when services are rendered to a person in "necessitous circumstances," does not apply between brothers and sisters.[137] The court's reasoning was based on the fact that collateral relatives have no legal obligation to support each other,[138] unlike children who have a duty to support a parent "in need" pursuant to Article 229.[139] However, the court stated that each case should be decided "on its particular[s]" rather than by a general rule.[140]

In *Dugas,* the deceased was a deaf, mute and blind woman.[141] For approximately 17 years before her death, her sister took care of her. When her sister sought compensation for those services, the other heirs of the deceased challenged the claim. The court, in strong language, chastised the heirs stating,

> We think therefore, that instead of claimant's claim coming "with poor grace," as contended by counsel for the opponent, it comes with poor grace for this opponent, who refused to help her afflicted sister during these many years, to oppose the claim of the sister who was willing to do so

134. Succession of Guidry, 40 La. Ann. 671, 673-74, 4 So. 893, 895 (1888).
135. Muse v. Muse, 215 La. 238, 40 So.2d 21 (1949).
136. Succession of Dugas, 215 La. 13, 39 So.2d 750 (1949).
137. *Id.*
138. *Id.*
139. La. Civ. Code art. 229. *See supra* footnote 117, for full text of the article.
140. Succession of Dugas, 215 La. 13, 39 So. 2d 750 (1949).
141. *Id.*

> and who, in this way, relieved the opponent of any responsibility in the matter.[142]

The court decided *Dugas* and *Muse,*[143] which denied recovery to a child, on the same day, thereby confirming its position that collateral relatives and children should be treated differently.

3. Problems with the Civil Law Approach

Throughout the cases the Louisiana courts fail to define "in need." In *Guidry* the court found that the son did not have a claim for contribution because his mother was in "necessitous" or "penurious" circumstances.[144] It made no other indication as to what assets or income she had at the time the services were rendered. It was simply a statement of fact with no evidence given to assist in later cases. Further, in *Muse* the care recipient was found not to be "in need" because she was the owner of 15 acres of land and also owned an undivided one-half interest and a usufruct over 120 more acres of land, all of which were unencumbered.[145] The court did not say if the land produced any income for the care recipient. Nor did the court indicate the value of the land. In *Succession of Templeman,*[146] a daughter who rendered nursing services to her mother was not allowed a claim for contribution from her siblings because her mother was not "in need," again without any reference to the mother's assets or income.

Another problem in the civil law approach is that it treats collateral relatives differently from children. Although the court should be applauded for moving away from the presumption of gratuity, there is no reason to treat collateral relatives differently from immediate relatives, such as children. The courts focus on Article 229's requirement to maintain ascendents and descendants.[147] However, all relatives suffer losses of some kind when rendering family care. These losses are suffered regardless of the nature of the blood kinship between the caregiver and the recipient. Therefore, all relatives should be compensated for rendering care and services.

Finally, the civil law approach in Louisiana results in some very harsh results for only children. Where a child has siblings and is able to prove that the parent is "in need," the child will at least be assured a claim for contribution against any siblings. However, if a parent

142. *Dugas*, 215 La. at 22, 30 So.2d at 753.
143. *Muse*, 215 La. 238, 40 So.2d 21.
144. Estate of Guidry, 40 La. Ann. 671, 4 So. 893 (1888).
145. Muse v. Muse, 215 La. 238, 40 So.2d 21 (1949).
146. *Templeman*, 134 La. 798, 64 So. 718 (1914).
147. *See c.f.* Estate of Oliver, 18 La. Ann. 594 (1866).

dies insolvent or with property that is heavily encumbered, the only child will receive nothing for the rendering of these most valuable services.

Like the common law approach, the presumption of gratuity is also strong and deeply rooted in Louisiana jurisprudence. Therefore, the best solution for family caregivers is state legislation that allows for a claim against the decedent's estate for the value of the services rendered.

V. THE ILLINOIS SOLUTION

A. The Statute and the Court's Interpretation

In 1988, the Illinois legislature enacted a unique statute which allows for a family caregiver to make a claim against the estate of the decedent if specific requirements are met.[148] When originally enacted,[149] the statute provided that a spouse, parent, brother, or sister of a disabled person could make a claim against the estate of the decedent.[150] The statute was amended in 1992 to also allow *children* of the disabled person to make a claim against the estate upon death of the care recipient.[151] Legislative history indicates that children

148. 1988 Ill. Legis. Serv. P.A. 85-1417 (West).

149. The legislature considered passing this statute as a means to protect a custodial parent if a child were permanently injured and not able to make a last will and testament. The legislature expressed concern that the custodial parent may expend more time in the caring for the child and therefore, as a matter of fairness, would be entitled to a greater portion of the child's estate. However, when the statute was passed it was written much more broadly and will arguably allow for claims by most family members against the estates of elderly relatives. *See* Statutory Custodial Claims: S. Tr. on H.B. 4116, 85th Gen. Assemb. at 54 (Dec. 1, 1988).

150. 755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992).

151. The statute now provides:

> Any spouse, parent, brother, sister, or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years shall be entitled to a claim against the estate upon the death of the disabled person. The claim shall take into consideration the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person. The claim shall be in addition to any other claim, including without limitation a reasonable claim for nursing and other care. The claim shall be based upon the nature and extent of the person's disability and, at a minimum but subject to the extent of the assets available, shall be in the amounts set forth below:
>
> 1. 100% disability, $100,000
> 2. 75% disability, $75,000

were added to the statute simply because they had been inadvertently omitted in the original statute.[152] The statute requires the family caregiver to "dedicate"[153] themselves to the care of the disabled person and also requires that they "live with"[154] the care recipient. The court is to consider a number of factors, such as lost employment opportunities, and the amount of compensation awarded will depend on the severity of the care recipient's disability.[155]

There has been relatively little case law interpreting the Illinois statute. However, in *Estate of Hoehn,*[156] an Illinois Appellate Court did not allow the sister of the decedent who had filed a claim against the estate to recover because she did not "live with the decedent."[157] The sisters were both retired and lived in the same apartment building across the hall from one another. According to the court, the "live with" requirement of the statute was not ambiguous - it required that the caregiver and the recipient share the *same household.*[158] The court also held that because the sister was retired, she did not suffer lost employment opportunities, and her lifestyle did not change much when living across the hall from her sister.[159] Perhaps the most damaging fact for the caregiver was that she failed to meet the three-year time requirement. She had rendered care to her sister for one and one-half years before her sister moved into a nursing home. The statute explicitly provides that the caregiver must provide care for *at least* three years, and she failed to meet this requirement.[160]

The Illinois appellate courts are split over the interpretation of the Illinois statute. In *Estate of Rollins,*[161] the court disagreed with the *Hoehn* court's interpretation of the statute. As stated by the *Rollins* court,

> We agree that whether a claimant suffered loss of employment opportunities or lifestyle opportunities or

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3. 50% disability, $50,000
4. 25% disability, $25,000.

755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992).

152. Statutory Custodial Claims: Senate Transcript on S. 1523, 87th General Assembly (May 13, 1992) (enacted).

153. 755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992).

154. *Id.*

155. *Id.*

156. 600 N.E.2d 899 (Ill. App. Ct. 1992).

157. *Id.* at 900-01.

158. *Id.* at 900.

159. *Id.* at 901.

160. *Id.*

161. 645 N.E.2d 1026 (Ill. App. Ct. 1995).

> emotional distress is probative, but we do not read the statute to mean that a claimant may not recover in the absence of those factors. And we do not agree that a claimant must show "full-time service."[162]

In *Rollins*, the caregiving sister had been compensated during the lifetime of her disabled relative, and the heirs claimed that this compensation was all that was required because the decedent had not intended to pay any more than that amount.[163] The court refused to consider the heirs' argument and, although the claimant appeared to meet most of the requirements, it disallowed the claim because of a lack of proof.[164] The court gave its own opinion on the requirements set forth in the statute, holding that claimants do not need to prove they spent every waking minute tending to the needs of the disabled person. However, they must show that they did more than merely "care" for the disabled person.[165] Moreover, claimants must show that the requisite care was extended to someone who was at least twenty-five percent disabled.[166] The claimant in *Rollins* failed to satisfy both of these requirements, and her claim was denied.[167]

In 1999, the Illinois Supreme Court was faced with an allegation that the statute was unconstitutional. In *Estate of Gebis*,[168] a son and daughter had acted as co-guardians for their mother, and upon the mother's death, the son filed a claim in the guardianship proceeding based on the statute. The court, however, did not reach the issue of constitutionality because the guardianship court lacked subject matter jurisdiction to decide the case.[169] Instead, the case was remanded.[170] At the original hearing in the trial court, the sister alleged that the statute was unconstitutional in that it violated both substantive and procedural due process principles, the equal protection clause, the prohibition against special legislation, and the separation of powers doctrine. The trial court agreed and granted the motion to dismiss based on its finding that the statute was, in fact, unconstitutional.[171] Because the court lacked jurisdiction, the Illinois Supreme Court reversed the decision[172] and the case has not yet reached the court through the proper channels. *Gebis* has been the only case involving

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162. *Id.* at 1033.
163. *Id.* at 1034.
164. *Id.*
165. *Id.*
166. Estate of Rollins, 645 N.E.2d 1026 (Ill. App. Ct. 1995).
167. *Id.*
168. 710 N.E.2d 385 (Ill. 1999)
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

the statute to reach the Illinois Supreme Court. However, a critical reading of the cases leads to the conclusion that despite the liberality and innovation of the statute, family caregivers will still face insurmountable obstacles in obtaining compensation for the valuable services they render.

B. Advantages of the Illinois Statute

The Illinois statute is a decisive step in the right direction. One beneficial aspect of the statute is that it does not require the family caregiver to prove the existence of an express contract. Removing the requirement of proving a pre-existing agreement on the compensation scheme is a much more favorable solution to the recovery issue, because such agreements rarely exist.[173] Instead, caregivers must show that they lived with the care recipient and provided the needed care for the requisite period of time: three years.[174] The caregiver must also prove that the care recipient is at least twenty-five percent disabled.[175] If the caregiver proves the necessary elements, then he or she will have an automatic right to make a claim against the estate.[176]

Another benefit of the statute is that the caregiver is treated as an actual creditor of the estate. In fact, the court in *Estate of Gebis* noted that "[s]tatutory custodial claims currently share first priority with funeral and burial expenses and administration expenses."[177] This gives caregivers equal standing with other end-of-life creditors, thus avoiding the potential depletion of the estate assets before they are compensated.

A third advantage of the Illinois statute is that it considers various negative effects of providing care on the caregiver. The statute specifically recognizes that a caregiver may suffer lost employment opportunities, lifestyle opportunities and emotional distress, which are all factors that recent studies have shown take an extreme toll on family caregivers.[178] Explicitly recognizing that these "costs" exist may have the added benefit of validating caregivers, as well as providing additional incentives for continued care.

Finally, the Illinois statute provides the financial incentives necessary to encourage family members to provide care to their

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173. *See supra* note 114.

174. 755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992). *See supra* note 151 for full text of the statute.

175. *Id.*

176. *Id.*

177. *Gebis*, 710 N.E.2d at 389.

178. 755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992). *See supra* note 151 for full text of the statue; Berg-Weger, *supra* note 26 at 13-14; *The MetLife Juggling Act Study, Balancing Caregiving with Work and the Costs Involved, supra* note 14.

relatives. There is a direct financial reward for "dedicating"[179] their lives to their relatives. This financial reward is explicit and provides concrete figures to family members. The family caregivers know how much they are entitled to receive and are also given a bottom line figure. For the sacrifices they have made, caregivers may receive as much as $100,000 but no less than $25,000, depending on the severity of the disability of the care recipient, provided the decedent's estate has enough assets to pay off the obligation. This financial incentive also encourages the caregiver to provide long-term healthcare as opposed to short-term healthcare. Because the statute provides a three-year minimum, caregivers are given an incentive to invest the time necessary to assist their relative. Caregivers will not be allowed to come in and provide mere days or weeks of care and expect $25,000 in compensation. They know that they must make a long-term commitment should they hope to be rewarded financially.

C. Disadvantages of the Illinois Statute

Although there are significant advantages with the statute, it is not without its problems. One deficiency in the statute is that it fails to recognize *all* family caregivers. While it does provide a means for obtaining compensation for spouses, parents, siblings and children,[180] it fails to provide for nieces, nephews, aunts, uncles, cousins and grandchildren, to name a few. Today, fewer people are having children compared to the early 1900's, and those having children are also having fewer children.[181] It is well within the realm of possibility to find an older American whose only remaining relative is a niece or cousin. In addition, it might be that extended relatives provide the necessary care because it is more feasible for them than for closer relatives.

Another disadvantage of the statute is its language. At least one court has recognized that the statute could be clearer.[182] The statute fails to give guidance as to what it means to "dedicate oneself" to the care of the disabled person, and the Illinois circuits are split with respect to the meaning of that phrase.[183] In *Rollins*, the court stated that "[t]he statute does not define what constitutes 'dedication' beyond 'living with and personally caring for the disabled person for

179. 755 Ill. Comp. Stat. Ann. 5/18-1.1 (West 1992). *See supra* note 151.
180. *Id.*
181. Jazwiecki, *supra* note 1, at 328.
182. *Rollins*, 645 N.E.2d at 1034.
183. *Rollins*, 645 N.E.2d at 1033-34; Estate of Hoehn, 600 N.E.2d 899, 901 (Ill. App. Ct. 1992).

at least 3 years.'"[184] On the other hand, the *Hoehn* court determined that "the factors to be considered in determining dedication are those listed in the statute itself: lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced from caring for the disabled person."[185] The ambiguity of the phrase will likely lead to much litigation, and the Illinois Supreme Court may eventually be forced to settle the split. The unwanted result of this ambiguity is the creation of a disincentive for family members to provide care to their relatives because family members may not feel assured that they will be compensated.

The statute also fails to provide factors that should be considered in determining whether a disability exists. It is not clear where a court should look to define this term. Examples include other Illinois statutes, expert opinions, and other areas of the law. Social Security laws define "disability" as an inability to do substantial gainful activity because of a medically determinable mental or physical impairment that has lasted or is expected to last for a continuous period of 12 months or more or that can be expected to result in death.[186] Arguably, this might include old age; however, a specific inclusion of the elderly will reduce litigation and thereby increase the incentive to provide care.

Another drawback of the statute is that it requires the care recipient and the caregiver to live in the same household. As seen in *Hoehn*, it is possible to render valuable and needed care while living in separate households. As the caregiver pointed out, living across the hall in an apartment building places the caregiver and the care recipient in such close proximity that they may be in a closer relationship than family members who live in the same house.[187] Imagine a house with a garage apartment that is simply a sleeping area without a kitchen facility or other rooms indicative of a home. Should we disallow compensation to these individuals because they are not in the same "house" but might be in the same "household?" This illustrates the arbitrary nature of the "living with" requirement. The statute should focus more on the time, expense, and intensity of the care given rather than the physical living arrangement.

As noted above, the three-year limit has the benefit of inducing family members to provide long-term care. However, it also has a negative effect. At times, an elderly person may be facing a rapidly advancing chronic illness with a low survival rate. Many times, the health of these individuals will deteriorate quickly, and they will be

184. *Rollins*, 645 N.E.2d at 1033.
185. *Hoehn*, 600 N.E.2d at 901.
186. Jazwiecki, *supra* note 1, at 294; 42 U.S.C. § 416(i)(1)(A) (1995).
187. *Hoehn*, 600 N.E.2d 899 at 900.

in need of expensive, immediate and challenging care. Under the Illinois statute, a relative who provides care to individuals with rapidly advancing illnesses will be left without a remedy.

VI. AN ALTERNATE SOLUTION

The Illinois statute is a good starting point when considering compensation for family caregivers. However, a statute which provides compensation by way of a claim against the estate for *any* relative based on a graduated scale is needed.[188] Such a statute should read as follows:

Chapter ___: Compensation for Family Caregivers

Section 1. Purpose

The intent of this legislation is to provide family caregivers with adequate financial compensation for providing any number of personal caregiving services for an elderly relative as outlined below. Nothing in this statute is intended to supercede any private contract that family members may voluntarily enter into. However, if no private contract has been entered into and personal care services have been rendered, this statute will control the determination of adequate compensation for family caregivers.

Section 2. Definitions

As used in this Chapter:

(1) "Elderly person" and "elderly care recipient" means any person aged 65 or older.[189]

(2) "Personal care" means assistance with the activities of daily living, including meal preparation, housekeeping, bathing, grooming, shopping, transporting to and from appointments, nursing and other care or assistance with any other activity which is required or needed by the elderly person.

(3) "Relative" means any person related to the elderly care recipient by marriage, blood or adoption including a child, grandchild,

188. Creating a right in the form of compensation may have tax consequences for the caregiver, however, the complex inner-workings of the Internal Revenue Code are outside the scope of this comment.

189. Although setting a minimum age requirement may cause problems for persons rendering care for seriously ill or disabled persons, because this paper focuses on the needs for compensating family caregivers of the elderly, a minimum age requirement has been selected which is seen in many studies using the term "elderly." *See c.f.* Rosalie A. Kane & Joan D. Penrod, *In Search of Family Caregiving Policy, in,* Family Caregiving in an Aging Society 1, 3, (Rosalie A. Kane & Joan D. Penrod eds., 1995).

sibling, niece, nephew, parent, grandparent, aunt, uncle and cousin.
Comment: [Legislatures should insert any appropriate comments here].

Section 3. Compensable Claim

A. A relative who provides personal care to an elderly relative shall be entitled to a claim against the estate of the elderly person if he or she has rendered at least 120 hours of personal care over a period of at least three consecutive months.

B. After receiving evidence relevant to a consideration of the factors listed in Section 4, the court shall determine the amount of compensation. The court shall grant priority to the satisfaction of this debt against the estate of the elderly person prior to the distribution of the estate to any testamentary beneficiary or heir.
Comment: [Legislatures should insert any appropriate comments here].

Section 4. Claim; amount; factors

Factors to consider when awarding compensation shall include:

(1) The time expended by the claimant in providing care.

(2) The extent and intensity of the care required by the elderly person.

(3) The duration of the care provided.

(4) The claimant's lost or diminished employment opportunities, if any.

(5) The claimant's lost lifestyle opportunities, if any.

(6) The claimant's physical, mental or emotional distress caused by the provision of care, if any.
Comment: [Legislatures should insert any appropriate comments here].

This statute addresses many of the concerns seen in the Illinois statute. It neither precludes compensation for distant relatives, nor does it significantly limit compensation based on the time period of care. Thus, a family caregiver can give intense, albeit brief, care to an elderly person in a rapidly advancing chronic illness and still receive compensation. Because it is possible to collect for services rendered over a much shorter period of time, there is no need for an express compensation scale. The value of the services should be determined by the judge who is aided by the evidence presented by the parties. Such evidence could include expert testimony placing a monetary value on the services rendered.

VII. CONCLUSION

The United States is facing an unprecedented increase in its elderly population because more Americans are living longer than

ever before.[190] In fact, the generation of persons aged 85 and older is "increasing at pace which will only exacerbate the demand for healthcare and social services."[191] As a result, the needs of the elderly will increase, as well as the demands on informal caregivers.[192] Whether the trend of informal family caregiving can continue in the future will depend on how society as a whole chooses to value and reinforce caregiving behavior.[193] It has been noted that "even the most committed informal family caregiver needs encouragement and incentives to continue the demanding and emotionally expensive role of primary care giver."[194] The best way to provide the needed incentives is to allow a family caregiver to make a claim against the estate of their elderly relative. This is an expeditious way of gaining compensation, and does not entail the red tape and limits seen in public compensation alternatives such as tax incentives or direct compensation in the form of restricted cash grants or vouchers. Furthermore, it does not place a drain on the states' economies, because the elders provide the payment themselves through their estates upon death. Finally, a direct claim against the estate will avoid the tangled web created by the doctrine of non-recovery seen in contract theory.

It is time to remove the disincentives and to replace them with incentives, particularly claims against the estates of care recipients. It is also time to recognize the value of the services provided by family caregivers and to reward them for the sacrifices they have made.[195]

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190. Jazwiecki, *supra* note 1, at 325.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. For those of you who may be concerned about the plight of my parents, not to worry. I recently relented and told them they can live in a garage apartment behind my house should the need arise.

* I wish to express my sincerest thanks to my faculty advisor, Professor Lucy McGough, for her invaluable advice and guidance, especially in drafting the proposed statute.